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IN THE
COURT OF APPEALS OF INDIANA

JOHN A. MURPHY,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0606-CV-461
	)	
TAMI LOUISE MURPHY,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CIVIL DIVISION 5
The Honorable Gary Miller, Judge
Cause No. 49D05-0409-DR-001813

January 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant, John A. Murphy ("Husband"), challenges the trial court's denial of his motion to amend and suspend child support. Upon appeal, Murphy claims that he is indigent and that the trial court erred in imputing income to him in calculating his child support obligation.

We affirm.

The record reveals that Husband married Tami Louise Murphy ("Wife") on March 6, 1994. Husband and Wife had one child, K.M., born on December 7, 1995. On September 29, 2004, Wife filed a Verified Petition for Dissolution of Marriage, in which she averred that Husband had committed "domestic battery"[1] upon her and K.M. and was, at that time, in the Marion County Jail. On October 6, 2004, the trial court set the matter for a preliminary hearing to be held on November 3, 2004. In the order setting the date for the preliminary hearing, the trial court ordered Husband to appear as follows:

> "1. That, said Petition should be set for Preliminary Hearing and Husband . . . should be ordered to appear in this Court at said hearing.
>
> 2. That, [Husband] is hereby ordered to personally appear in the Marion County Superior Court, Room No. W-507, 5th Floor, West Wing, City-County Building, Indianapolis, Indiana, at 9:30 o'clock A.M., on the 3rd day of Nov. 2004 to show cause, if any he may have, as to why all relief requested in said Petition and all other collateral relief should not be granted, on a preliminary basis.
>
> 3. That, [Husband] is currently in the Marion County, Indiana Jail . . . . The Marion County, Indiana Sheriff shall personally serve a copy of said Petition and this Order on [Husand] within the Marion County, Indiana Jail and make due return to this Court. [Husband], if still in the custody of the Marion County, Indiana Sheriff on the date of the preliminary hearing shall

[1] The Indiana Department of Correction's website indicates that Husband was sentenced on May 4, 2005 for Stalking. See http://www.in.gov/serv/indcorrection_ofs?previous_page=1&detail=148040 (last visited Dec. 15, 2006).

be transported to this court for said hearing." Appellee's Appendix at 20-21.

On October 27, 2004, financial declarations were filed by both parties. However, at the preliminary hearing held on November 3, 2004, Husband failed to appear.[2] No transcript of this hearing has been provided upon appeal. Indeed, on July 20, 2006, Husband filed a motion in this court to proceed without a transcript, which motion was granted on August 22, 2006.

On November 3, 2004, the trial court entered a preliminary order which gave Wife physical and legal custody of K.M. and ordered Husband to pay $69 per week in child support.[3] Additionally, Husband was ordered to pay for one-half of the $143 per month cost of "Central Catholic," presumably a parochial school. The preliminary order also gave Wife temporary possession of the marital residence, along with the responsibility for the monthly mortgage or rent, insurance, and taxes thereon, and ordered Wife to be responsible for the utilities and expenses of the residence. Wife was also given temporary possession of a 1993 minivan and was further ordered to be responsible for minimum monthly payments on "all current outstanding debts." Appellee's App. at 17. The preliminary order also contained provisions temporarily restraining both Husband and Wife from disposing of any asset of the parties, from changing the named

[2] Husband claims in his brief, with no supporting cite to the record, that he was "prevented from attending the hearing (despite the fact that he was at a separate hearing in the same building that morning)." Appellant's Br. at 1.

[3] The trial court appears to have arrived at this amount by reference to the child support worksheet filed by Wife, which listed $500 as Husband's weekly gross income and resulted in a recommended support obligation of $69.63.

beneficiaries on policies insuring the lives of either party or K.M., and from removing K.M. from Indiana with the intent to deprive the court of jurisdiction.

There is no indication in the record before us that Husband challenged this preliminary order in any way until August 10, 2005,[4] when he filed a pro se Motion to Rescind Child Support Order.[5] This motion asked the trial court to rescind Husband's child support obligation and to expunge the records of any accumulated arrearage. In this motion, Husband claimed that he was incarcerated at the time of the preliminary hearing and did not receive notice of the hearing, that he was not employed and had no source of income, and attacked Wife's claim in her petition for dissolution that Husband was capable of earning $30,000 per year due to his post-secondary education and degrees. On August 26, 2005, the trial court entered the following into its minutes: "No orders were provided nor stamped envelopes. No evidence of service on opposing party. Time for appeal of preliminary order has passed. Motion to rescind C[hild] S[upport] order denied." Appellant's App. at 22.

Husband did not appeal this denial but instead, on September 14, 2005, filed a Verified Petition for Modification of Child Support Payment. In this petition, Husband stated that he had been sentenced to a five-year executed sentence on May 4, 2005, that he did not expect to be released from prison until April 11, 2008, that he received only $13 per month as income in prison, and that he was therefore unable to pay the $69 per

[4] An entry in the CCS reveals that on July 27, 2005, the trial court received a letter from "the DFNT," presumably Husband, but there is nothing in the record which reveals the contents of this letter. Appellant's App. at 8.

[5] Although titled as a "verified" motion, the motion was not, in fact, verified.

month child support payment. On September 16, 2005, the trial court denied the requested modification, noting, "Child is not a party to nor responsible for [Husband]'s criminal behavior resulting in [Husband]'s incarceration." Appellant's App. at 28. On September 22, 2005, the trial court denied a motion for certification for interlocutory appeal, apparently from the court's September 16 ruling.

On October 4, 2005, Husband filed a notice of appeal, which was given the Cause Number 49A02-0510-CV-998 in this court. On February 27, 2006, this court issued an order stating in relevant part:

> "The Appellant having modified his address and contact information and the Clerk of this Court having sent items to him at the addresses given by him and said items having been returned to the Clerk of this Court in the mail marked 'Not at this Address, Return to Sender,' and the Clerk having no other address, the Court finds that the Appellant has abandoned this appeal and accordingly, the Court further FINDS AND ORDERS that this appeal should be and the same now is DISMISSED."

Apparently undeterred by his lack of familiarity with trial or appellate practice, Husband, on April 26, 2006, filed a Motion to Amend and Suspend Child Support Order. In this motion, Husband again claimed that he is indigent because of his incarceration, has no access to any other asset as a result of the preliminary order, and requested the trial court to reduce the support order to reflect his "true" ability to pay. The following day, the trial court entered an order denying Husband's motion. Husband filed a notice of appeal from this order on May 25, 2006. It is this notice of appeal which gave rise to the instant case.

We note that the case before us is an interlocutory appeal, and there is no indication that Husband sought to certify the case before the trial court as a discretionary

interlocutory appeal. However, it has been held that provisional orders for the payment of child support are appealable interlocutory orders as of right. See Crowley v. Crowley, 708 N.E.2d 42, 50 (Ind. Ct. App. 1999);[6] see also Castor v. Castor, 165 Ind.App. 520, 523, 333 N.E.2d 124, 126 (1975) (holding that court had jurisdiction to hear appeal from interlocutory order for maintenance and attorney fees). The preliminary order entered by the trial court required Husband to pay $69 per week in child support, and is therefore an appealable interlocutory order.

We must further note, however, that the preliminary order was issued on November 3, 2004. Husband points to nothing in the record, and our review of the materials before us reveals nothing, which would indicate that Husband brought an interlocutory appeal from this order. If Husband wished to challenge the preliminary order, he had thirty days within which to file a notice of appeal pursuant to Indiana Appellate Rule 14. Husband filed a notice of appeal from the trial court's April 27, 2006 denial of his Motion to Amend and Suspend Child Support Order. He cannot attack a trial court order that is now over two years old.

Husband also claims upon appeal that the trial court erred in refusing to amend or correct the preliminary support order. Husband's April 26, 2006 Motion to Amend and Suspend Child Support Order appears to be a motion to modify child support.

[6] In Bojrab v. Bojrab, 810 N.E.2d 1008, 1014 n.3 (Ind. 2004), the court noted that the opinion in Georgos v. Jackson, 790 N.E.2d 448 (Ind. 2003) acted to overrule Crowley to the extent that Crowley held that orders for temporary maintenance or support must be immediately challenged by interlocutory appeal and the failure to do so waives the right to assert such a challenge in an appeal from the final judgment. We do not read either Bojrab or Georgos to disagree with the proposition that orders for temporary maintenance or support are, nevertheless, appealable interlocutory orders.

Modification of child support orders are governed by statute, specifically Indiana Code § 31-16-8-1 (Burns Code Ed. Repl. 2003). This section provides that "[p]rovisions of an order with respect to child support . . . may be modified or revoked." Id. Except as provided in another statute which is not applicable here, modification may be made only:

> "(1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
> (2) upon a showing that:
> (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
> (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed." Id.

Here, Husband makes no argument that under either subsection (1) or (2), he is entitled to a modification of support. His argument instead is directed at the problems he perceives in the preliminary order itself: that he is still unable to earn any significant income due to his incarceration, that the trial court's preliminary order deprives him of access to any of his assets, and that he will be unable to earn the income imputed to him when he is released from incarceration. As explained, Husband cannot now attack the preliminary order after failing to appeal the same. Regardless, even considering Husband's claim that the trial court erred in denying his most recent motion, he does not establish reversible error.

Incarceration due to voluntary criminal conduct is not a valid rationale for abatement of an existing child support order. See Holsapple v. Herron, 649 N.E.2d 140 (Ind. Ct. App. 1995) (holding that when a criminal act or the resulting consequences therefrom are the primary cause of an obligor's failure to pay child support, abatement of

the obligation is not warranted); Davis v. Vance, 574 N.E.2d 330 (Ind. Ct. App. 1991) (holding that it would be contrary to the Indiana Child Support Guidelines and to public policy favoring a child's security and maintenance to allow payments to abate based upon a willful, unlawful act of the obligor).[7] Therefore, Husband's incarceration, and his resulting inability to earn any significant income, is not a valid reason for abating his current child support obligation of $69 per week.

Moreover, although Husband is correct to the extent that the trial court's preliminary order gives access to most of the marital assets to Wife, he neglects to mention that she is also burdened with the marital debts and the responsibilities for maintaining the marital residence. Further, both Husband and Wife are enjoined by the preliminary order from dissipating the marital assets.

Father's remaining claims regarding his inability to gain employment even after his incarceration has ended are both speculative and unsupported by any citation to evidence in the record.[8] Even assuming that he is correct in his assertions that he had been a stay-at-home parent for several years, Husband does not directly refute the fact contained in Wife's verified petition for dissolution that he has a post-secondary

[7] In Lambert v. Lambert, 839 N.E.2d 708, 713-15 (Ind. Ct. App. 2005), the court extended these holdings to conclude that incarceration due to voluntary criminal conduct is not a valid reason for not imputing income to the incarcerated parent when setting the initial support amount. However, on April 18, 2006, our Supreme Court granted transfer in Lambert and has not yet issued an opinion in that case. Nevertheless, we agree with the Lambert court's statement that an incarcerated parent would likely be unable to meet his child support obligation while incarcerated and a contempt finding would likely be inappropriate for any arrearage accrued while incarcerated. Id. at 714-15.

[8] Although we recognize that Husband is proceeding upon appeal pro se, this is not an excuse for failure to follow the applicable Appellate Rules. See Lasater v. Lasater, 809 N.E.2d 380, 396 (Ind. Ct. App. 2004) (a litigant who chooses to proceed pro se will be held to the rules of procedure the same as would trained legal counsel).

education. Given his educational background, we cannot say that the trial court abused its discretion in imputing to Husband income which would justify a mere $69 per week, or $3,588 per year, in child support.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.